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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review --)
Spectrum Aggregation Limits)
for Wireless Telecommunications Carriers)

WT Docket No. 98-205

COMMENTS OF D&E COMMUNICATIONS, INC.

D&E Communications, Inc. ("D&E"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹ D&E, which maintains an interest in Personal Communications Service ("PCS") systems in central Pennsylvania,² urges the Commission to retain in all but the largest urban markets its current spectrum aggregation limits which govern the amount of Commercial Mobile Radio Service ("CMRS") spectrum that can be licensed to a single entity within a particular geographic area. D&E believes that lifting the CMRS spectrum cap would be premature and counterproductive at this time, and offers data which demonstrates that the actual level of competition in the markets in which it operates

¹Notice of Proposed Rulemaking (1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers (WT Docket No. 98-205); Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap (WT Docket No. 96-59); Implementation of Sections 3(n) and 332 of the Communications Act (GN Docket No. 93-252); and Regulatory Treatment of Mobile Services), FCC 98-308 (released Dec. 10, 1998)) (the "NPRM").

²D&E is the ultimate parent corporation of D&E Wireless, Inc., a partner in the D&E/Omnipoint Wireless Joint Venture, L.P., which holds and controls the following PCS licenses: Block D -- Harrisburg BTA (Market B181); Block E -- York-Hanover BTA (Market B483); Block E -- Lancaster BTA (Market B240); and Block C -- Reading BTA (Market B370) (disaggregated).

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does not justify a change in the spectrum cap restriction. Because the wireless marketplace in most geographic areas is not yet truly competitive, the CMRS spectrum cap is still necessary to advance the goals touted by the Commission in establishing and maintaining the cap.

I. The 45 MHz Spectrum Cap Advances Critical Policy Goals

Pursuant to the CMRS spectrum cap, set forth in section 20.6 of the Commission's rules, a single entity may acquire attributable interests in the licenses of broadband PCS, cellular, and Specialized Mobile Radio ("SMR") services that cumulatively do not exceed 45 MHz of spectrum within the same geographic area.³ The CMRS spectrum cap was originally adopted in 1994, at a time when most parts of the country received mobile voice services from two cellular providers. With the Commission's decision to allocate 120 MHz of spectrum for PCS and the Congressional directive to auction that spectrum in a manner that "avoid[s] excessive concentration of licenses and . . . disseminat[es] licenses among a wide variety of applicants,"⁴ the CMRS spectrum cap was established with the purpose of ensuring that multiple service providers would be able to obtain spectrum in each market and thus facilitate development of competitive markets for wireless services.⁵

The Commission has subsequently defended the CMRS spectrum cap in a variety of contexts including rulemaking proceedings and court challenges. As recently as two weeks ago, the U.S. Court of Appeals for the District of Columbia Circuit upheld the CMRS spectrum cap against a challenge by BellSouth Corporation, finding that since 1994 "the Commission has consistently

³47 C.F.R. § 20.6.

⁴47 U.S.C. § 309(j)(3)(B). This subpart of the Communications Act of 1934, as amended, was added by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(c), 107 Stat. 312.

⁵Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 81004-5 (1994) ("CMRS Third Report and Order").

maintained that general spectrum aggregation will enable an anticompetitive exercise of market power absent a cap on the amount of spectrum one entity can hold.”⁶ In 1996, following a notice and comment rulemaking, the Commission reaffirmed the basic tenets of the CMRS spectrum cap and provided additional economic rationale for its use.⁷ In the CMRS Spectrum Cap Report and Order, the Commission found that the use of a single 45 MHz CMRS spectrum cap had advantages over maintaining three separate caps and ruled that such a spectrum cap “is necessary in order to avoid excessive concentration of licenses and promote and preserve competition in the CMRS marketplace.”⁸

The CMRS Spectrum Cap Report and Order provided extensive justification for the Commission’s establishment and retention of the CMRS spectrum cap:

We adopted the 45 MHz CMRS spectrum cap in the *CMRS Third Report and Order* in order to “discourage anti-competitive behavior while at the same time maintaining incentives for innovation and efficiency.” We were concerned that “excessive aggregation [of spectrum] by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents.” The continuation of the 45 MHz spectrum cap will promote competition and prevent anti-competitive horizontal concentration in the CMRS business. Up to a point, horizontal concentration can allow efficiencies and economies that would not be achievable otherwise, and can therefore be pro-competitive, pro-consumer, and in the public interest. At some point, however, horizontal concentration starts to work against those goals because it results in fewer competitors, less innovation and experimentation, higher prices and lower quality, and these disadvantages outweigh any advantages in terms of economies and efficiency.⁹

⁶BellSouth Corporation v. FCC, Case No. 97-1630, p.8 (D.C. Cir., Jan. 8, 1999).

⁷Amendment of Parts 20 and 24 of the Commission’s Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission’s Cellular/PCS Cross-Ownership Rule, WT Docket 96-59, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824, 7864-87 (1996) (“CMRS Spectrum Cap Report and Order”).

⁸Id. at ¶ 94.

⁹Id. at ¶ 95 (internal citations omitted).

The CMRS Spectrum Cap Report and Order identified another critical purpose served by the CMRS spectrum cap, stating that the cap “is also needed specifically to prevent cellular licensees from gaining too great a competitive advantage over new entrants to the wireless telephony market.”¹⁰ According to the CMRS Spectrum Cap Report and Order, cellular companies already hold licenses for 25 MHz of clear spectrum, and they already have technical expertise, customer bases, marketing operations, and antenna and transmitter sites. Cellular companies thus have a competitive position superior to any new market entrant, and have strong incentives to preserve that advantage.¹¹ The Commission therefore decided that “the 45 MHz cap will help to level the playing field for all new entrants, while ensuring that incumbent providers are not placed at any disadvantage.”¹²

Finally, the CMRS Spectrum Cap Report and Order found that the CMRS spectrum cap “furthers the goal of diversity of ownership that we are mandated to promote under Section 309(j).”¹³ The Commission ruled that a “spectrum cap is one of the most effective mechanisms we could employ” to achieve the goals of that statute, namely avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants.¹⁴

The purpose of this rulemaking, as stated in the NPRM, is to “examine whether the current rule continues to further the public interest, or whether circumstances have changed so as to warrant modification or repeal of the CMRS spectrum cap.”¹⁵ D&E submits that meaningful competition has

¹⁰Id. at ¶ 101.

¹¹Id.

¹²Id.

¹³Id. at ¶ 102.

¹⁴Id.

¹⁵NPRM at ¶ 2.

not yet developed in many wireless telecommunications markets since the Commission last revisited the rationale for the CMRS spectrum cap. Only the largest, most urban areas have achieved any significant levels of competition. D&E urges the Commission in conducting this rulemaking not to view the market for wireless telecommunications as a homogeneous national market with large, urban characteristics. Rather the Commission must assess the actual state of competition that exists in all markets. D&E submits that in the vast majority of geographic areas the CMRS spectrum cap still serves the goals for which it was adopted and retained.

II. Competition Has Not Advanced Sufficiently In Many Markets To Warrant Repeal Or Relaxation Of The CMRS Spectrum Cap

The NPRM noted the Commission's belief that the spectrum cap has been useful in promoting competition in mobile voice services,¹⁶ and in inhibiting competition eroding spectrum consolidation.¹⁷ The NPRM pointed to significant new entry into mobile voice services in certain localities, including a few markets which now have seven operational competitors providing cellular, PCS and digital SMR services.¹⁸ The NPRM correctly acknowledged, however, that the extent to which services are presently available in individual markets varies considerably.¹⁹ D&E agrees with the Commission that, "[p]articularly in smaller towns and rural markets, cellular incumbents continue to hold competitive advantages vis-a-vis market entrants that are not very different from those existing when the cap was originally conceived and implemented."²⁰ However, the Commission's view is too limited

¹⁶Id. at ¶ 35.

¹⁷Id. at ¶ 37.

¹⁸Id. at ¶ 35, n.100.

¹⁹Id. at ¶ 36.

²⁰Id.

inasmuch as the advantages enjoyed by the cellular incumbents are just as formidable in the smaller cities/urban areas.

D&E maintains an interest in PCS licenses for several Basic Trading Areas ("BTAs") in central Pennsylvania: Harrisburg, Lancaster, Reading, and York-Hanover. In these markets, the number of mobile voice service competitors with systems that are actually operating at present are:

<u>Harrisburg BTA</u>	<u>Lancaster BTA</u>	<u>Reading BTA</u>	<u>York-Hanover BTA</u>
2 cellular	2 cellular	2 cellular	2 cellular
1 SMR	1 SMR	1 SMR	1 SMR
1 PCS	1 PCS	2 PCS	1 PCS

In these markets, the two cellular incumbents still maintain the vastly dominant share of the mobile voice service market. D&E only launched service in the Lancaster BTA in November of 1997, in the Harrisburg BTA in December of 1997, and in the Reading and York-Hanover BTAs in November of 1998. The other operational PCS provider in the Reading BTA launched service in or around May of 1998. The new entrants that are operational in these markets are merely fledgling competitors. The SMR provider in these areas has only a small portion of the mobile voice service market. These wireless telecommunications markets are still highly concentrated and without meaningful competition. Lifting the spectrum cap in these markets would permit the aggregation of spectrum by firmly entrenched incumbents with the tremendous financial resources and incentive to put new entrants out of business.

In assessing the CMRS spectrum cap, the Commission must not use the number of licensees in the market, the amount of licensed spectrum, or even the number of operational competitors, as a means of determining the competitiveness of the market for mobile voice services. In all geographic areas, the Commission may license up to two cellular, six PCS, and multiple SMR providers. Even if nine or more different entities were licensed to provide CMRS in a particular market, that would

not necessarily mean the licensees were operational or that the market was competitive.²¹ Likewise, simply because the Commission licensed 120 MHz of PCS of spectrum in addition to the 50 MHz of existing cellular spectrum would not in and of itself make the market competitive.²² Even the number of operational competitors in a particular market does not demonstrate the competitiveness of the market, as those competitors may be very recent entrants who possess only a small market share.

In the above-described markets of central Pennsylvania the actual state of competition for mobile voice services systems closely resembles the state of competition when the CMRS spectrum cap rules were initially adopted and when the Commission revisited the cap in the CMRS Spectrum Cap Order. In 1994, when the spectrum cap was adopted, in 1996, when the CMRS Spectrum Cap Order was issued, and today, these markets for mobile voice services were and are dominated by the two incumbent cellular providers. The lack of actual competition is not limited to central Pennsylvania, however. As of June, 1998, about 40 percent of the nation's BTAs did not have access to service from either a PCS or digital SMR provider.²³ The NPRM correctly asserts that "many of the nation's residents living in rural and other high-cost areas do not yet have meaningful competitive alternatives to the incumbent cellular carriers."²⁴ The truth is, however, that many smaller cities/urban

²¹It is beyond dispute that a PCS operator does not obtain customers or operating revenues upon the issuance of its CMRS license. It takes at least a year or longer for a PCS operator in any major market to even begin commercial testing of its system and, as evidenced by build-outs to date, it requires approximately two years for most PCS operators. At that point, the PCS operator still has no customers and has not deconcentrated the mobile market at all.

²²The fact that the incumbent cellular providers in a particular geographic area hold less than one-third of the licensed CMRS radio spectrum would not prevent them from controlling virtually all of the market share for mobile voice services in that area.

²³NPRM at ¶ 45. The Commission noted that even in the BTAs showing coverage from new entrants, only limited portions of the BTAs may actually receive service from the new entrants. Id. at n. 116.

²⁴Id. at ¶ 45.

areas are also without substantial competition in the mobile voice services market. D&E believes that the state of competition in the above-described Pennsylvania BTAs exemplifies the level of actual competition in many of the 483 BTAs across the country.

D&E believes that the Commission and the public will not need not wait much longer for CMRS competition to arrive in full force in all markets if the CMRS spectrum cap is retained. Many of the new mobile entrants, especially those outside of large, urban markets, remain in an embryonic mode. One reason is that the Commission's licensing of PCS spectrum has taken much longer than anticipated. For example, the auction for C and F block PCS licenses for entrepreneurs and small businesses was conducted in 1995, with most licenses issued in 1996. Final licensing in all markets has not even been completed, however, as the reauction for such spectrum will occur in two months and additional time will be required before these licenses are issued. Many eager competitors have not even had their licenses for more than a short period of time. Moreover, infrastructure build-out takes longer in areas other than large, urban markets, not only because of economic incentives, but also because of factors such as distance and terrain. Even after a market is licensed and built-out, establishing a market presence against incumbent cellular carriers takes time.

D&E submits that the Commission would be making a grave mistake by repealing or easing the CMRS spectrum cap before there are even entrants -- much less viable competitors -- in many markets. Especially in markets other than large, urban areas, new PCS entrants require additional time to develop their businesses before the spectrum cap is lifted. Otherwise, these new entrants will fall prey to the very anti-competitive conduct and entrenched market power of incumbents that the cap was designed to prevent.

The spate of recent mega-mergers, including Bell Atlantic-NYNEX, Bell Atlantic-GTE, AT&T-Vanguard Cellular, and SBC-Comcast Cellular, will result in spectrum cap issues. However,

the CMRS spectrum cap is specifically designed to ensure that companies will compete in the developing mobile communications marketplace, not by aggregating spectrum which prevents or retards competitive entry, but by encouraging competitors to build out new and innovative networks. Mergers and acquisitions will give already formidable companies with large amounts of spectrum and existing customers, even more spectrum and an additional established customer base in developing markets. The market dominance and financial clout of such companies will certainly have a negative impact on new entrants in these markets and will thwart the development of competition. New entrants must be given more than a year or two to establish a market presence prior to the elimination of the competitive safeguards of the spectrum cap.

The CMRS spectrum cap should be maintained in its present form in all but the largest urban markets. As Commissioner Tristani noted in her separate statement to the NPRM, the rash of new entrants tapers dramatically as we look beyond our urban centers, yet other areas do not have less interest in receiving the benefits of wireless technology.²⁵ The Communications Act requires the Commission to ensure that the benefits of telecommunications are available to all the people of the United States, and to help rural areas in particular.²⁶ Meaningful competition has simply not developed yet in the mobile voice services market, particularly outside of the largest urban areas. The Commission must not hastily sweep away the CMRS spectrum cap and the safeguards it provides which will allow such competition to flourish, simply because it is required to perform the first of its biennial regulatory reviews under the mandates of the Telecommunications Act of 1996.

²⁵NPRM, Separate Statement of Commissioner Gloria Tristani.

²⁶Id., citing 47 U.S.C. §§ 151, 309(j)(3)(A) and (B), 254(b)(3) and 254(h).

The CMRS spectrum cap still serves the goals for which it was adopted and retained: 1) to promote competition and prevent anti-competitive horizontal concentration; 2) to prevent incumbent licensees from gaining too great a competitive advantage over new entrants to the wireless telephony market; and 3) to achieve the Commission's statutory mandate to promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants.

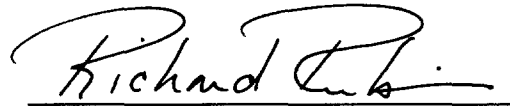
III. Conclusion

For the reasons discussed in these comments, D&E urges the Commission to retain the CMRS spectrum cap in all but the largest urban markets.

Respectfully submitted,

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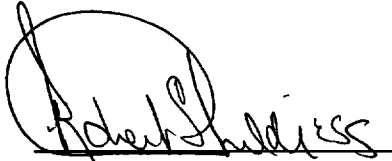
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CERTIFICATE OF SERVICE

I, Robert S. Childress, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Comments of D&E Communications, Inc." was served this 25th day of January 1999, via hand delivery, upon the following:

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